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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

Nos. 91 and 93

IVAN C. McLEOD, Regional Director for the Second Region of the National Labor Relations Board, *Petitioner,*

against

EMPRESA HONDURENA DE VAPORES, S. A., *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, *Petitioner,*

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

AND

BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS *AMICUS CURIAE*

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Dated, New York, N. Y.
September 24, 1962.

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MOTION OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

By reason of the growing concern of the Government of the United Kingdom of Great Britain and Northern Ireland with respect to a series of decisions taken by the Na-

tional Labor Relations Board and federal and state courts within the United States during the past two years concerning matters affecting the internal economy of foreign flag vessels and the relationship between foreign flag ship owners and their crews, the Government of the United Kingdom respectfully moves for permission to file a brief *amicus curiae* in the above entitled actions.

The Solicitor General of the United States on behalf of Ivan C. McLeod, Regional Director for the Second Region of the National Labor Relations Board, Petitioner, and Empresa Hondurena De Vapores, S. A., Respondent, have consented to the filing of this brief. The National Maritime Union of America AFL-CIO, Petitioner in Case No. 93, has not.

Since this court is aware of the fact that the petitioner has long been somewhat involved in foreign trade, the movements of cargo and the international commerce of the world, no detailed summary of its interests in all phases of international trade will be submitted in support of its request to be heard in this litigation. Simply stated, the United Kingdom Government is gravely concerned, both on legal principle and economically, that this Honorable Court continue to recognize in this case the doctrine of the law of the flag.

It is respectfully requested that this motion be granted.

Respectfully submitted,

LAWRENCE HUNT,
Counsel for THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND.

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BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS *AMICUS CURIAE*

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Statement

This brief is filed by the Government of the United Kingdom as *amicus curiae*, because the legal principles and practical consequences involved in this case are of paramount

importance to all maritime nations, including the United Kingdom.

Whenever the domestic law of one country infringes upon or threatens to infringe upon the free flow of commerce between friendly nations the Government of the United Kingdom is seriously concerned. The Government of the United Kingdom respectfully points out that attempts to impose upon non-United States citizens the local law of the United States with respect to the rights of labor and managament are completely contrary to the frequently expressed intention of the Government of the United States.

The English-speaking nations, among others, have learned, in many cases in "the hard way", that it is neither proper nor practical to impose their own laws and decrees on the essentially internal affairs and management of other nations. A scrupulous respect for the independence of other nations is a major feature in the United States' relationship with other sovereign states. In international maritime commerce, the law of the flag is both the symbol and the most practical safeguard of that independence.

The policy of the United States as defined by statute is "to eliminate the causes of certain substantial obstructions to the free flow of commerce". (National Labor Relations Act, Section 1, 29 U. S. C. Section 151). The apparent conclusion of the National Labor Relations Board in this case that a country in which a foreign flag vessel happens to be at any given point in time has the right to substitute its local law for that of the vessel's flag in matters concerning only the internal discipline and economy of the vessel is not only contrary to the United Kingdom's understanding of American principles generally, but would greatly impede and obstruct all foreign commerce.

It may be too simple a view, even an outmoded view, to contend that a vessel is merely an extension of the territory of the State whose flag it flies. This doctrine, it is now

generally accepted, was based on a fiction or metaphor. It is, however, unnecessary to employ the fiction of territoriality to account for or to justify the "venerable and universal rule of maritime law which gives cardinal importance to the law of the flag". There are sound practical reasons for the rule of the subjection of vessels to the laws of the flag State; it rests upon principles of convenience, of international comity, and of international law. Under the latter, a State, when granting its nationality to a merchant vessel, both accepts responsibility for that vessel and acquires authority over it, and the vessel is accorded certain rights by other countries because of the flag it flies. For this reason, it has come to be generally accepted that even in territorial waters jurisdiction will not be exercised by the coastal State over foreign merchant vessels in matters which are primarily the responsibility of the flag State and, in particular, that "all matters of discipline and all things done on board" which do not involve the peace or tranquility of the coastal State should be left to the authority of the flag State. Any assumption of jurisdiction which is in conflict with these principles can only be regarded as inimical to international trade.

As this Court will note, the Government of the United Kingdom has also moved to file a brief *amicus curiae* in *Incres Steamship Company Ltd.* against *International Maritime Workers Union et al.* Both cases involve the same principle. It is true that in this case the stock ownership of the foreign flag vessel is American. We respectfully submit that stock ownership should not displace or impair the doctrine, so long maintained and so recently reaffirmed by this Court, that in matters concerning the internal discipline and economy of the vessel the law of the flag controls. It is a matter of major importance to the Government of the United Kingdom that the principle of the law of the flag be clearly sustained in this case.

Argument

For centuries it has been the law of the sea that so long as domestic peace and tranquility are not affected the internal problems arising between a vessel, its officers and owner, are matters governed by the laws of the vessel's flag. In the comparatively recent cases of *Lauritzen* v. *Larsen*, 345 U. S. 571, *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100, and *Benz* v. *Compania Naviero Hidalgo*, 353 U. S. 138, this Court has recognized this principle and has held that the relationships between foreign shipowners and foreign seamen are not subject to the same laws as govern the relationships between American shipowners and American seamen. The soundness of the holdings of this Court in those cases is apparent as a matter of law and of common sense in encouraging trade among friendly nations. Speaking of the Labor Management Relations Act in the *Benz* case, this Court said that "Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws."

In the present cases, EMPRESA is admittedly the wholly owned subsidiary of an American corporation. However, Empresa is a legal corporate entity established under the laws of a foreign country, in this case the Republic of Honduras. Similarly it must be noted that the vessels owned by Empresa are registered under the laws of that foreign country; they fly its flag and are engaged in its foreign commerce. Both the corporation and its vessels are subject to the laws of that country.

There are few countries in the world in which there do not exist subsidiaries which are established under the laws of those countries, but which are wholly owned by citizens of the United States or, indeed, by those of the United Kingdom. The investment of American capital in the development of rubber plantations in Liberia, iron ore in Venezuela and Brazil, petroleum in the Middle East, and the

establishment of wholly owned American subsidiaries in those countries do not subject the labor employed by those subsidiaries in Liberia, Venezuela and Brazil to the jurisdiction of the National Labor Relations Board, and there is no reason why the investment of American corporations in a Honduran corporate entity which owns and operates vessels should, in law, have any different consequences. The fact that vessels are transitory does not diminish their nationality, nor the effect of their national law over their activities. In neither the one case nor the other is it the function of the United States, or of any maritime nation, to extend its jurisdiction over the citizens of other countries by imposing on them its own laws and standards of living.

It is submitted that stock ownership is, as a basis for jurisdiction, likely to give rise to grave uncertainties in international maritime commerce. Since stock ownership in corporations is subject to change without resulting in changes in basic corporate structure or the laws to which the corporation is subject, what effect would a sale of its entire stock interest by the American investor have upon the labor relations of the vessels, their crews and an American labor union, assuming that the National Labor Relations Board has jurisdiction over the current dispute? Would Honduras or other foreign purchasers of the stock of the foreign corporation operating foreign flag vessels be subject to the directives of the National Labor Relations Board? How could the Board enforce its directives if the vessels were engaged in trade which did not bring them to the United States?

Also, by way of hypothetical question, even if there were no change of stock ownership, if the Honduran courts were to find that Honduran law applies to the labor management relations of all vessels flying its flag, whose directives must the Honduran corporation follow?

The United Kingdom Government respectfully submits that stock ownership is too feeble and fluctuating, too uncertain and impracticable, to threaten or weaken the law

of the flag as the decisive and prevailing doctrine affecting the internal economy of a vessel.

The Court below (*Empresa Hondurena De Vapores, S. A.* v. *Mcleod*, 300 F. 2d 222 (1962), at 234), in Judge Friendly's lucid opinion, has summarized the Honduran "contacts" of *Empresa* in this case, which the Court said go "far beyond the flying of the Honduran flag, important as Lauritzen teaches that to be." The Court referred to "the Honduran citizenship of the crews, the employment of the crews in Honduras under Honduran articles, the vessels' regular visits to Honduras, the Honduran corporate identity—admittedly not fictitious—of the owner, the long recognition of and contract with a Honduran union, and the provisions of Honduran law regulating labor matters". The Court then said:

> "Though the vessels are engaged in the foreign commerce of the United States, they are also engaged in the foreign commerce of Honduras. The only United States contacts not matched by Honduran ones are United Fruit's stock ownership and its direction and use of the voyages; these are substantially outweighed, for the purpose here at issue, by Honduras' interests.

The United Kingdom Government respectfully submits that these contacts should not be decisive and that the paramount and controlling factor, as this Court has maintained and reaffirmed in the cases cited herein, should remain the "law of the flag". To substitute a standard composed of "contacts", which would have to be constantly weighed and reweighed, would not be a practicable aid to the free flow of international maritime commerce. The scales of justice are not apothecary's scales; they serve and regulate the practical affairs of men in the varied business of the world. Principles of law do not solely endure as abstract legal theories. They exist, they endure, because they work. Such a principle is the law of the flag. It is sound in law, as the "United States has firmly and successfully main-

tained" in *Lauritzen* v. *Larsen*, 345 U. S. 571, 584. And it works.

The cogent words of the United States Attorney General's brief, *amicus curiae*, in this case before the National Labor Relations Board (see pp. 15-20), should be emphasized here. That brief "submitted . . . that the flag, as a ready recognizable, and accepted standard must be preferred pragmatically to any other and that in accordance with that standard, the indirect financial interest of American citizens in a foreign registered ship may not deprive a vessel of its status as a national of the country whose flag is flown". (Quoted by the Court below in 300 F. 2d 222, at 225.)

This Court will bear in mind now, as in the recent past, that most if not all maritime nations, including the United Kingdom, have developed over a long period of time an integrated system of conditions of employment which includes full consultation between representatives of employers and employees on all aspects of employment and which specifically provides for methods for settling disputes. These systems reflect the individual customs, state of economic development, and standard of living of each nation. In the case of the United Kingdom, this system and these carefully developed methods have been very successful, and possible intervention by the National Labor Relations Board in their operation is necessarily a matter of the greatest concern to the United Kingdom Government.

It is respectfully and urgently suggested that this Court should exercise its power in affirming the decision of the Court of Appeals. It is also respectfully and urgently suggested that this Court, in as specific language as is practicable, indicate to lower courts, both state and federal, as well as to administrative agencies, that it is not their function to impose upon non-citizens, non-resident employers and employees, the American standard of employer—employee relations, and that the practicable principle of the law of the flag, so recently expounded by this Court,

still prevails to insure both the free flow and stability of international commerce. Such guidance would be an immensely stabilizing influence for all maritime nations at this time. In view of the foreign policy of the United States which is based on the concept of the full independence of all sovereign states and their freedom from any form of foreign domination, it would largely thwart the purpose of that policy to attempt to impose American law upon foreign steamship companies and would be contrary to both the old and the recent decisions of this Court.

CONCLUSION

The Law of the Flag should control in this as in past cases decided by this Court. Therefore, the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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